

No. 89-271

SEP 13 1989

JOSEPH F. SPANIOLO, JR.
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In The
Supreme Court of the United States
October Term, 1989

RAY J. BELISLE, et al.,

Petitioners,

v.

RALPH C. ANZIVINO, Trustee of the bankruptcy estate of
Oliver Plunkett and Monica Plunkett,

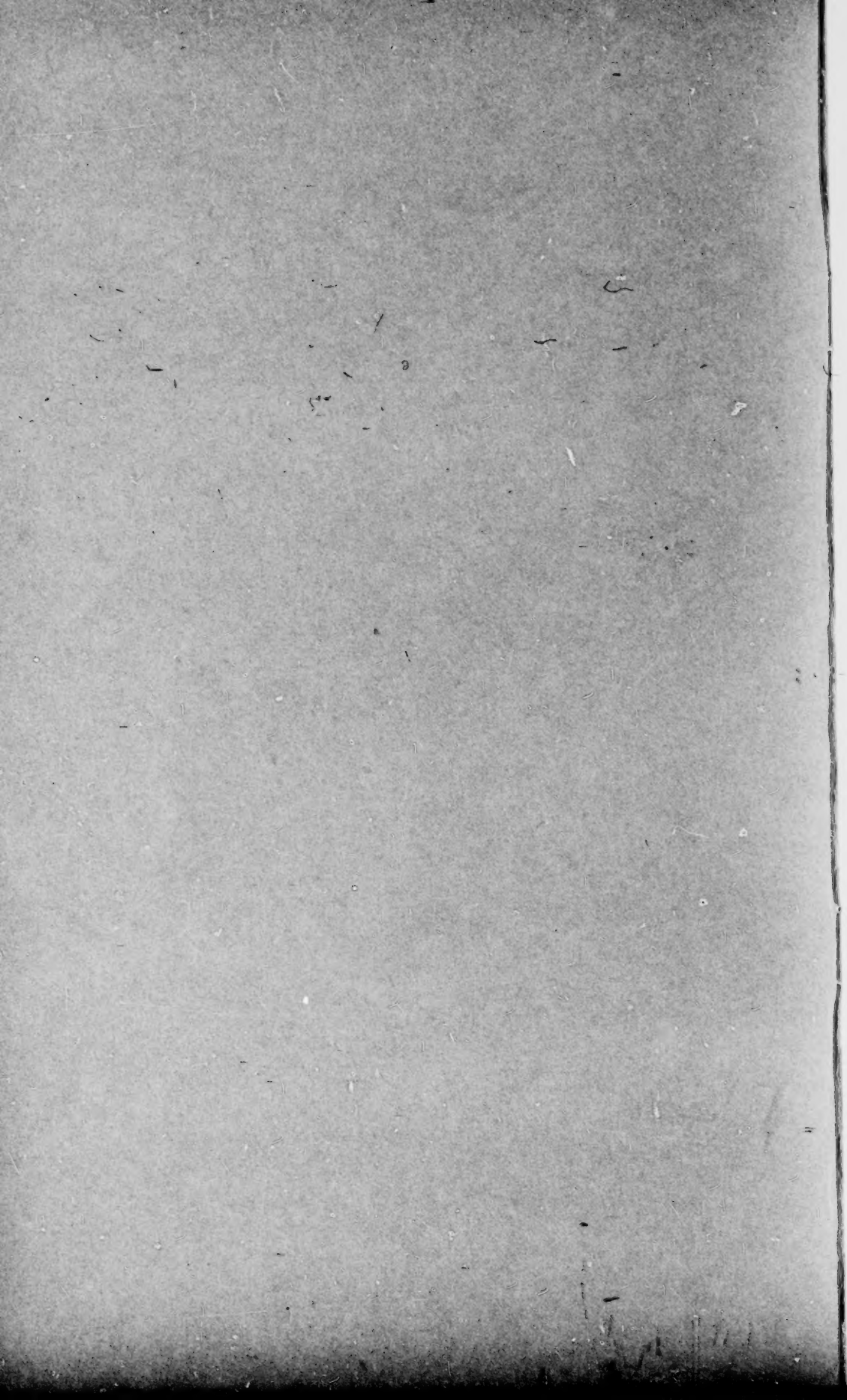
Respondent.

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

When state law allows a bona fide purchaser of real property that is titled in the debtor's name to take the property free of the unrecorded interest of constructive trust beneficiaries, does a bankruptcy trustee have the same rights by virtue of his status as a bona fide purchaser under 11 U.S.C. § 544(a)(3)?

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STATEMENT OF THE CASE

Respondent, Ralph Anzivino (the "Trustee"), accepts the Statement of the Case offered by the Petitioners. The Trustee further accepts the Petitioners' appendix, and will refer to the Seventh Circuit's decision below as "Slip op. at ____." The decision is now reported as *Belisle v. Plunkett*, 877 F.2d 512 (7th Cir. 1989). In this brief, all statutory citations are to Title 11 of the United States Code.

REASONS FOR DENYING THE WRIT

I. THERE IS NO DIRECT CONFLICT AMONG THE CIRCUITS CONCERNING THE QUESTION PRESENTED IN THIS CASE.

Petitioners claim that the federal courts of appeal are split into two camps over the question presented below: The Fifth and Eighth Circuits, which supposedly "have held that § 541(d) prevails over § 544(a)(3)," *Petition* at 11; and the Third, Seventh and Ninth Circuits, which "have held just the opposite." *Id.*¹

¹ Petitioners also point out that the Sixth and Eleventh Circuits have declined to resolve the same issue, instead deciding similar cases on state-law grounds. See *In re Crabtree*, 871 F.2d 36 (6th Cir. 1989); *In re General Coffee Corp.*, 828 F.2d 699 (11th Cir. 1987). Obviously, this approach does not create a "conflict" with the other circuits.

Nor do the decisions cited by the Petitioners from bankruptcy or district courts in Michigan and Tennessee create a "conflict" that this Court needs to resolve. See *Petition* at 13, 16. Such intra-circuit inconsistencies will be eliminated whenever the Sixth Circuit *does* address the issue.

Actually, neither the Fifth nor the Eighth Circuit has directly held that § 541(d) prevails over § 544(a)(3). Of the five "conflicting" decisions cited by the petitioners (three from the Fifth Circuit, two from the Eighth), only one even mentions § 544 of the Code, and does so in dictum. See *Matter of Quality Holstein Leasing*, 752 F.2d 1009 (5th Cir. 1985).

In *Quality Holstein*, the Fifth Circuit decided that the complaining creditor could not assert a constructive trust against an airplane titled in the debtor's name. The court did indeed state that "[a]s a general rule . . . section 541(d) prevails over the trustee's strong-arm powers." 752 F.2d at 1013. However, that statement was unnecessary to the court's ultimate holding – because no constructive trust existed, the question of whether trust property can become part of the bankruptcy estate was not directly presented. The Seventh Circuit recognized that "the discussion of § 541(d) in *Quality Holstein Leasing* is dictum." Slip Op. at 8.

Moreover, *Quality Holstein* involved personal property, not real estate. The Fifth Circuit's comments about the trustee's "strong-arm powers" are therefore limited to his status as a judicial lien creditor under § 544(a)(1) and an execution creditor under § 544(a)(2). In resolving a dispute over an airplane, the *Quality Holstein* court did not decide the scope of § 544(a)(3), which applies strictly to real property and governs the instant case. Thus, the Fifth Circuit's holding in *Quality Holstein* does not

conflict with the Seventh Circuit's decision below because the two cases involve different parts of § 544(a).²

The other "conflicting" decisions cited by Petitioners do not involve real property, do not involve a trustee's bona fide purchaser status, and do not involve § 544 in any way. In each case, the court simply recited the general rule concerning constructive trusts and "bare legal title," without deciding (or even considering) how that rule might be affected by a trustee's status as bona fide purchaser under § 544(a)(3). See *In re Emerald Oil Co.*, 807 F.2d 1234 (5th Cir. 1987) (trustee's proposed settlement of avoidance action was an abuse of discretion because of certainty he would prevail on merits; no constructive trust and § 544 never mentioned); *In re N.S. Garrott & Sons*, 772 F.2d 462 (8th Cir. 1985) (escrow fund not property of bankruptcy estate because held in constructive trust; § 544 never mentioned); *In re Flight Transportation Corporation Securities Litigation*, 730 F.2d 1128 (8th Cir. 1984) (trustee's proposed settlement approved because of substantial question regarding viability of constructive trust theory; § 544 never mentioned); *Georgia Pacific Corp. v. Sigma Service Corp.*, 712 F.2d 962 (5th Cir. 1983) (debtor's receivable from owner of project becomes part of bankruptcy estate; no constructive trust in favor of debtor's materialmen and § 544 never mentioned).

² As the Seventh Circuit explained, the distinction between real and personal property is a critical one. Under most states' laws, a bona fide purchaser of real property *does* divest the rightful owner of his interest if the owner failed to record that interest. Slip Op. at 6. In contrast, judicial lien creditors and execution creditors take airplanes and other personal property subject to the claims of the rightful owner. *Id.*

To summarize, there is no direct conflict between the Seventh Circuit's decision below and the decision of any other federal court of appeals. In the cases cited by Petitioners, the scope of § 544(a)(3) was either not raised at all, or was raised only in dictum. Rather than a split of authority, a substantial unanimity has in fact developed — three federal courts of appeal have squarely held that a bankruptcy trustee, as a bona fide purchaser under § 544(a)(3), takes real property titled in the debtor's name free of the unrecorded interest of constructive trust beneficiaries. See *Belisle v. Plunkett*, 877 F.2d 512 (7th Cir. 1989); *In re Tlecl*, 876 F.2d 769 (9th Cir. 1989); *In re Elin*, 20 B.R. 1012 (D.N.J. 1982), *aff'd mem.*, 707 F.2d 1400 (3rd Cir. 1983). This Court should not grant a writ of certiorari to review an issue on which the courts of appeal are unanimous except for dictum by the Fifth Circuit.

II. THE SEVENTH CIRCUIT PROPERLY CONSTRUED THE RELEVANT STATUTES.

Petitioners suggest that the Seventh Circuit misconstrued the relevant statutes in two ways. In both instances, however, any statutory ambiguity was removed by the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAFJA"). The BAFJA amendments not only confirm the Seventh Circuit's interpretation of the prior statutes, but also insure that future litigants will not repeat the Petitioners' arguments concerning statutory construction.

A. Section 541(d) Does Not Limit Section 544(a)(3).

As originally enacted, § 541(d) provided that "property in which the debtor holds . . . only legal title and not an equitable interest . . . becomes property of the estate under subsection (a) . . . only to the extent of the debtor's legal title to such property." The Seventh Circuit held that this version of § 541(d) does not prevent property from coming into the bankruptcy estate through other sections of the Bankruptcy Code, such as the trustee's strong-arm powers. Slip Op. at 7-8. But, the Petitioners argue, property recovered by the trustee's strong-arm powers ultimately enters the estate through § 541(a)(3) or (a)(4) and, they claim, § 541(d) limits *all* of subsection (a), including these two provisions.

To the extent § 541(d) was ever ambiguous in this respect, Congress clarified the statute five years ago. As amended by BAFJA in 1984, § 541(d) now reads: "Property in which the debtor holds . . . only legal title and not an equitable interest . . . becomes property of the estate under *subsection (a)(1) or (2)* . . . only to the extent of the debtor's legal title to such property." 11 U.S.C. § 541(d) (emphasis added). Thus, § 541(d) *only* limits § 541 (a)(1) and (a)(2); it does not limit subsections (a)(3) or (a)(4), which incorporate the trustee's strong-arm powers and bring into the estate property recovered by the trustee.

Nothing in the legislative history suggests that the amendment was intended to change the size or nature of the bankruptcy estate. The amendment does, however, confirm the Seventh Circuit's interpretation of the predecessor statute – § 541(d) does not preclude property in which the debtor has only legal title from coming into the

estate through the trustee's strong-arm powers. In any event, this Court should not grant certiorari for the purpose of construing a statute that was superseded five years ago and that has no bearing on any bankruptcy case filed after the October 1984 effective date of BAFJA.

B. Section 544(a)(3) Does Not Require A Transfer By The Debtor.

Petitioners also claim that the Seventh Circuit misconstrued § 544(a)(3). Specifically, Petitioners argue that § 544(a)(3) only permits a trustee to avoid actual transfers of real property by the debtor – as opposed to unrecorded beneficial interests in that property – because otherwise the phrase “such transfer” would be meaningless. *Petition* at 26. The Seventh Circuit rejected this argument, concluding that “such transfer” refers to the *hypothetical* transfer that makes the trustee a bona fide purchaser. *Slip Op.* at 7.

Again, any possible ambiguity was removed by the BAFJA amendments, through which Congress added a second reference to “such transfer” in § 544(a)(3). As the statute now reads, the trustee has the rights and powers of a bona fide purchaser of real property from the debtor:

against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser *and has perfected such transfer* at the time of the commencement of the case, whether or not such a purchaser exists.

11 U.S.C. § 544(a)(3) (emphasis added).

Thus, the Seventh Circuit's interpretation of § 544(a)(3) was also correct – the second use of the phrase

"such transfer" clearly refers to the hypothetical transfer to a bona fide purchaser. The phrase does not, as Petitioners suggest, limit the trustee's strong-arm powers to avoiding pre-petition transfers by the debtor. That interpretation was scarcely plausible in 1982, and has been thoroughly discredited by the BAFJA amendments. Again, this Court should not grant certiorari for the purpose of construing a statute that was both clarified and superseded five years ago.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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